BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WANITA MOELLER	)	
Claimant	)	
VS.	)	
	)	Docket No. 245,545
WAL-MART	)	
Respondent	)	
AND	)	
	)	
INSURANCE COMPANY	)	
STATE OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the May 31, 2001 Award entered by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on March 12, 2002.[1]

APPEARANCES

Matthew L. Bretz of Hutchinson, Kansas, appeared for claimant. R. Todd King of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.[2]

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[1] The Board initially scheduled oral argument for December 14, 2001, but argument was rescheduled at claimant's request.

[2] The affidavit of Christina Gocke should not be considered as part of the evidentiary record as the parties neither stipulated that it should be admitted into evidence nor was it offered into evidence at either a hearing or deposition. Accordingly, claimant was not given an opportunity to object to its admission and the Judge was not given an opportunity to rule upon its admissibility. The administrative file indicates respondent and its insurance carrier's attorney forwarded the affidavit to Judge Moore by facsimile on March 27, 2001,

ISSUES

This is a claim for a January 5, 1998 accident, in which claimant fell and broke her right hip. In the May 31, 2001 Award, Judge Moore determined claimant had a 62 percent permanent partial general disability that was created by a 93 percent task loss and a 31 percent wage loss. In analyzing claimant's wage loss, the Judge found that claimant had failed to make a good faith effort to find employment with another employer. Therefore, the Judge imputed a post-injury wage of $173.81 per week.

Respondent and its insurance carrier contend Judge Moore erred by awarding claimant a 62 percent permanent partial general disability. They contend respondent offered claimant accommodated work that she refused to attempt and, therefore, claimant's permanent partial disability should be limited to her 10 percent whole body functional impairment rating.

Conversely, claimant contends the Award should be affirmed. Claimant argues respondent never made a bona fide offer of accommodated work, nor accommodated her permanent work restrictions during the period that she returned to work following the accident.

The principal issue before the Board on this appeal is the extent of claimant's permanent partial general disability. But in deciding that issue, the Board must determine whether respondent made claimant a bona fide offer of accommodated work and, if so, whether claimant unreasonably refused to attempt to perform it.

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. On January 5, 1998, claimant, who was then 63 years old, fell and broke her right hip. The parties stipulated that claimant's accident arose out of and in the course of her employment with respondent as a salesclerk. The parties also stipulated that claimant's pre-injury average weekly wage from her part-time job with respondent was $251.46.

2. Claimant, who has a ninth grade education, began working for respondent at its Hutchinson, Kansas, store in 1985. At the time of the January 2001 regular hearing, claimant was 66 years old and had been receiving social security retirement benefits since she was 62.

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accompanied by a cover letter that did not copy claimant's attorney.

3. The day after the accident, orthopedic surgeon Dr. Clarence R. Hart operated on claimant's right hip and implanted screws to repair the fracture. Approximately one month after the accident, claimant began having symptoms in the left hip. On March 31, 1998, the doctor released claimant to sitting work only.

4. When claimant returned to work, respondent accommodated her medical restrictions for approximately two days as her supervisor assigned her to sort socks and count lace. After those two days, respondent assigned claimant to the fitting room where claimant worked for another two days. In that job, claimant answered the telephone and assisted customers who were either trying on clothes or trying to find certain merchandise. Claimant was also required to assist another employee in the clothing merchandise area. When claimant attempted to use a stool while out on the floor among the merchandise, one of respondent's district managers prohibited it for safety reasons. Respondent took claimant's stool and returned her to her regular job duties as a salesclerk, the job in which claimant worked for the next approximately 26 months before resigning. According to claimant, over those 26 months she complained to her immediate supervisor about working outside her medical restrictions.

5. Claimant continued to work for respondent through July 21, 2000, when she resigned her position because she could no longer tolerate the pain. Before resigning, however, claimant wrote a June 29, 2000 resignation letter to respondent, which read:

> I was injured on January 5, 1998, and underwent hip surgery by Dr. Clarence Hart. After surgery I returned to work with temporary restrictions. I was released from his care some time ago with permanent restrictions of sitting work only. I return to the doctor for follow-up checkups on a yearly basis.
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> When I got the sitting work only permanent restrictions, I gave the restrictions to Linda Howard. She was my direct supervisor and was one of the assistant managers at the time. Ms. Howard put the restrictions in my file for all of the managers to review, but no sitting work was provided. I was told to do my normal duties, and I have done everything I could to perform my normal duties even though this has caused me further problems and significant pain. I now have constant pain in my right hip, and pain down into both knees.
>
> My normal schedule has been Monday through Friday, from 7 am until 2 pm. By the time I get off each day, I have increased pain and am unable to do much of anything for the rest of the day. By Thursday at noon, the pain is so bad that I have to take four Extra-Strength Tylenol tablets. I have to keep taking the Tylenol until the end of the week. By the following Monday, after having a couple of days to recuperate, the pain is more tolerable but is still present.
>
> Patty, the new co-manager, has stated that my schedule is going to be changed so that I would be working an evening shift as well.

> Again, my permanent restrictions are for sitting work only. This scheduling is particularly difficult as the pain which I experience gets worse as the day goes on. Starting work half-way [sic] through the day, and working into the evening, will cause further physical problems and pain. Patty did not offer sitting work during this new schedule and I understand that I will be required to do my normal work as a sales clerk [sic]. As a sales clerk [sic], none of my duties are done while sitting.
>
> Based on the permanent restrictions of sitting work only, Wal-Mart's refusal to allow me sitting work, and the physical problems which I have as a result of not being provided sitting work, I find that I have little choice but to leave Wal-Mart's employment.
>
> I will be taking July 3 and July 5 as personal time off. I will then be taking July 6 through July 20, 2000, as my vacation time. I will leave Wal-Mart's employment effective July 21, 2000.
>
> On June 20, 2000, I celebrated fifteen years as a Wal-Mart employee. I do not want to leave Wal-Mart, but with my physical limitations and with Wal-Mart not providing work within the restrictions, I do not have a choice. I wish you the best.

6. Between the time that claimant sent her June 29, 2000 resignation letter and her last day of work on July 21, 2000, respondent neither provided nor offered claimant work that could be performed sitting down. But sometime later, in an undated letter from one of respondent's co-managers, Patricia Arnold, respondent offered claimant a job in the fitting room. Claimant responded to the offer with a letter dated November 13, 2000, in which claimant corrected certain assertions that Ms. Arnold had made. First, claimant noted that they had not spoken following the June 29, 2000 resignation letter and that respondent had not offered her work within her work restrictions following the resignation letter. Second, claimant noted that she had previously worked in the fitting room and it was not a job that could be done while seated.

7. Respondent next wrote claimant on December 11, 2000, and offered her a job as a greeter. In that letter, Ms. Arnold acknowledged that she did not know what claimant's restrictions were and did not realize that the fitting room job violated claimant's restrictions. Ms. Arnold also apologized for the factual errors contained in her earlier undated letter. Ms. Arnold's December 11, 2000 letter reads:

> I want to apologize for my previous letter [the undated letter]. I thought we visited after the letter [the June 29, 2000 resignation letter] you sent to Christina, Lee, and myself.
>
> I realize how hard it is in the fitting room, standing, sitting, reaching, and constant customer courtesy, but I did not realize your restrictions prohibited you from doing these things. I am sorry that I did not know exactly what your restrictions were.

> Neta, we have a greeter position that would work with your restrictions, as we have an associate now that sits and greets our customers. Would this be something you would like to do?
>
> All of the associates, including all of the management team, would be very happy if you came back to work here. We value you as an associate here and always have.
>
> Please let me know as soon as possible if this is something that you would consider doing.
>
> Again, Neta, I apologize for my previous letter and the discrepancies. I look forward to hearing from you.

Ms. Arnold's lack of knowledge concerning claimant's injury and restrictions may be understandable as she did not begin working at the Hutchinson store until May 2000 and she was not aware that claimant had medical restrictions until receiving claimant's June 29, 2000 resignation letter. Ms. Arnold testified at her March 2001 deposition that claimant's accident file did not contain any information concerning medical restrictions and that she had never received an actual copy of the medical restrictions. Moreover, Ms. Arnold also testified that respondent did not offer claimant sitting work only between the date of claimant's resignation letter and her last day of work.

8. The Board notes Ms. Arnold's testimony is somewhat inconsistent with her written notes and letters. First, Ms. Arnold testified that claimant advised she was leaving because she was traveling to England with her husband. But a typed undated memorandum signed by Ms. Arnold states that claimant had completed her England trip before returning to work for the day of a going away party for claimant. Second, Ms. Arnold testified that claimant could do both the greeter and fitting room jobs while seated the entire shift. But as indicated above, Ms. Arnold writes in her December 11, 2000 letter that the fitting room job is demanding as it requires standing, reaching and constant customer courtesy.

9. Claimant did not personally contact respondent about the greeter position. Instead, claimant wrote respondent on December 20, 2000, and stated that respondent might now have ulterior motives as respondent refused to accommodate her work restrictions when she was employed there. Moreover, claimant also testified she did not believe she could perform the greeter job as she had observed others doing that job and knew that it required standing and walking as the greeter walks customers to the service desk and walks customers to specific merchandise they are seeking.

10. As of the January 2001 regular hearing, claimant had not worked since leaving respondent's employment approximately six months before. But claimant had contacted some 20 potential employers by telephone and another 12 or 14 in person. When

telephoning potential employers, claimant would advise the employer that she was restricted to sitting work only. Claimant testified that Pizza Hut, the Hutchinson Clinic, Long John Silver's, Burger King, Sears, Penney's and Alco were potential employers that she had contacted. Despite the various companies that she had personally visited, at the time of regular hearing claimant had not submitted any written job applications.

11. As mentioned above, claimant received medical treatment for her fractured right hip from orthopedic surgeon Dr. Clarence R. Hart. While treating the right hip, the doctor had claimant's left hip x-rayed and discovered that she had advanced osteoarthritis in that joint. It was the doctor's impression that claimant's left hip worsened while he was treating the right hip. The doctor's final diagnosis was fractured right hip and osteoarthritis of the left hip. And because of the bilateral hip involvement, Dr. Hart restricted claimant to sitting work only. The final opinion that the doctor gave at his February 21, 2001 deposition was that it was more probably true than not that claimant's right hip problems contributed to the symptoms that claimant had in her left hip. The doctor testified, in part:

> Q. (Mr. Bretz) Can you tell me whether or not on a more likely than not basis, a fifty-one percent basis, whether the problems she experienced with her right hip contributed in any way to the symptoms -- the increased symptoms she had in her left hip?
>
> A. (Dr. Hart) I would have to say more than likely it increased her problems of her left hip.[3]

At his deposition, Dr. Hart reviewed a list prepared by claimant of the 15 work tasks that she had performed in the 15-year period before the January 1998 accident. Dr. Hart indicated that claimant could no longer perform 14 of the 15 tasks.

12. Respondent and its insurance carrier hired orthopedic surgeon Dr. Bernard T. Poole to evaluate claimant. Dr. Poole examined claimant in June 2000 and concluded that claimant was continuing to have symptoms in her right hip due to the three screws that were used to affix the hip in the January 1998 surgery. The doctor also found that claimant was having symptoms in her left hip from advanced osteoarthritis and that claimant would soon need a total left hip replacement. The doctor indicated claimant should not perform work that required her to be on her feet the majority of the day, and that she was completely unable to do any work that required squatting, kneeling, crawling or significant bending or lifting. Dr. Poole testified he could not challenge an allegation that claimant's left hip worsened due to the right hip injury due to his personal experience. The doctor explained how his own left hip had deteriorated more quickly than it would have otherwise due to the inability of his right hip to function normally. The doctor testified, in part:

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[3] Dr. Hart's February 21, 2001 deposition at page 16.

> Q. (Mr. King) Now, Doctor, you mentioned the left hip. Is there any basis to determine with any medical probability that the degenerative condition of the left hip and ultimately the necessity for hip replacement is, in fact, related to the right hip fracture?
>
> A. (Dr. Poole) I could not draw any clear linear connection between the two, but to be perfectly honest, I cannot challenge an allegation such as [that] because of being unable to function normally on my good right hip, my left hip has deteriorated more quickly than it would have done otherwise. It's definitely a possibility, but I can find no evidence that the left hip itself directly sustained any traumatic event in the fall which fractured her right hip.[4]
>
> . . .
>
> Q. Doctor, I have two questions. Mr. Bretz discussed with you minor contribution, that being the right hip somehow contributing to the degeneration of the left hip.
>
> A. I believe what my statement was, that it was quite possible that there was a contribution to the status of her left hip as it now is, by the incident of a fracture in the right hip, causing, for a period of time, increased loading on the left hip, but I can absolutely not quantify that in any way but based on my experience, and on the absence of traumatic pathology in the left hip, I consider such a contribution to be of minor importance in the inevitable necessity for a left total hip replacement. But I cannot state that it in no way contributed to possibly accelerating the date at which a left total hip replacement becomes necessary.[5]

The doctor rated claimant's functional impairment from the right hip at 10 percent to the whole body, which the doctor believed conformed to the American Medical Association's *Guides to the Evaluation of Permanent Impairment*. Dr. Poole also reviewed the task list compiled by claimant and also indicated that claimant could no longer perform 14 of the 15 former work tasks.

CONCLUSIONS OF LAW

1. The Judge's conclusion that claimant has sustained a 62 percent permanent partial general disability should be affirmed.

2. Because claimant's injuries comprise an "unscheduled" injury, her permanent partial general disability is determined by the formula set forth in K.S.A. 1997 Supp. 44-510e. That statute provides, in part:

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[4] Dr. Poole's February 13, 2001 deposition at pages 8 and 9.

[5] Dr. Poole's deposition at page 26.

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[6] and *Copeland*.[7] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption of having no work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wages should be based upon an ability to earn rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from his or her injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[8]

3. The primary questions presented to the Judge were whether respondent made a genuine or bona fide offer to claimant of accommodated work and, if so, did claimant unreasonably refuse to attempt to perform that work. Respondent did not offer claimant work within her permanent medical restrictions limiting her to sitting work only until Ms. Arnold's letter of December 11, 2000, in which Ms. Arnold proposed a modified greeter's position. As indicated above, the fitting room position that was mentioned in Ms. Arnold's undated letter actually did not conform to claimant's restrictions. The Judge concluded that under the circumstances that claimant was not unreasonable in declining the purported accommodated job offers based upon respondent's history of treating claimant. The Judge reasoned:

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[6] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[7] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[8] *Copeland*, at 320.

> Here, the evidence is quite clear that Respondent failed or refused to honor Claimant's permanent work restrictions from Dr. Hart, the authorized treating physician, and required Claimant to work outside of her restrictions for over a year until the pain became too great to continue in Respondent's employ. The question then becomes whether Claimant was "reasonable" in declining Respondent's subsequent offers of "accommodated work". In considering this issue, the Court must consider the surrounding circumstances and the context of the parties' relationship. Respondent's undated offer of a position in the fitting room is problematic in that it refers to a meeting Claimant says never occurred, (which Ms. Arnold implicitly acknowledges in her subsequent undated letter apologizing for the misstatements in the first letter).[9] The offer of the fitting room attendant position was also made without knowledge of the physical requirements for performing the position in Respondent's Hutchinson store, or that Claimant had previously, albeit briefly, performed that position. Under these circumstances, the Court believes Claimant was "reasonable" in refusing to accept the offer of the fitting room attendant position. Ms. Arnold's subsequent offer of a "greeter" position was made in an environment of distrust created by the Respondent's previous failure or refusal to honor Claimant's work restrictions, and Claimant's awareness that the "greeter" position required more than just sitting. Both Ms. Arnold and Ms. Gocke (through her affidavit) have testified that accommodated work was readily and easily available within Claimant's permanent restrictions, yet no accommodated work was actually provided to Claimant (other than for four days following her initial return to work) until after she had terminated her employment. Given the course of dealing between the parties, Claimant was not unreasonable in refusing to return to Respondent's employ.[10]

The Board agrees with Judge Moore's analysis and conclusion that claimant did not unreasonably refuse to return to work for respondent.

4. The Board also affirms the Judge's conclusion that a post-injury wage should be imputed because claimant has failed to make a good faith effort to find employment after leaving respondent's employ. The Board concludes claimant's limited job search was not a genuine effort to find appropriate work. The Board agrees with the Judge that the federal minimum wage of $5.15 per hour should be imputed for a post-injury wage as that is supported by respondent and its insurance carrier's vocational rehabilitation expert James Molski. Accordingly, the Board imputes a post-injury part-time wage of $173.81 per week, which is $5.15 per hour times 33.75 hours per week. Comparing claimant's pre-injury part-time weekly wage of $251.46 to the post-injury part-time weekly wage of $173.81 yields a wage loss of 31 percent, as determined by the Judge.

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[9] The Board notes that the Judge mistakenly refers to a second undated letter, which is actually Ms. Arnold's December 11, 2000 letter.

[10] Page 7 of the May 31, 2001 Award.

5. The Board also affirms the Judge's conclusion that claimant has sustained a 93 percent task loss, which is based upon claimant's loss of 14 of her 15 former work tasks as established by both Dr. Hart and Dr. Poole. Respondent and its insurance carrier's argument that claimant omitted former work tasks is considered and found to be without merit. The Board concludes the task list compiled by claimant described the tasks that she performed in the 15-year period before the January 1998 accident. Once claimant presented evidence of her task loss, the burden of going forward with the evidence shifted to respondent and its insurance carrier. And, in this instance, respondent and its insurance carrier failed to introduce testimony from a physician, as required by statute, that claimant had any task loss other than the 93 percent.

6. Averaging claimant's 31 percent wage loss with her 93 percent task loss creates a 62 percent permanent partial general disability.

7. The Board adopts the findings and conclusions set forth in the Award that are not inconsistent with the above.

AWARD

WHEREFORE, the Board affirms the May 31, 2001 Award entered by Judge Moore.

IT IS SO ORDERED.

Dated this ____ day of April 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Matthew L. Bretz, Attorney for Claimant
R. Todd King, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Workers Compensation Director